No. 15085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

The Appellant replies to Appellee's Brief as follows:

I.

A. THE DEFENDANT TWENTIETH CENTURY WAS ENTITLED TO THE BENEFIT OF THE DECLARED VALUATION PROVISIONS.

The Appellee, under Subsection "A" of its Brief, asserts the invalidity of the Rules "as they purport to limit the Appellant's liability for negligence" (Appellee's Br. p. 7). The issue in this case in no way involves a limitation of liability for negligence. The only issue concerns the applicability of declared valuation provisions. The Appellee concedes in principle the validity of these provisions (Appellee's Br. p. 15).

1. **Congress, in the Civil Aeronautics Act of 1938, Has Specifically Made Provision for the Filing of Air Carrier Tariffs Applicable to Services in Connection With Air Transportation.**

Calnevar contracted for a shipment that necessarily involved the performance of pick-up and delivery services *in connection with air transportation.* The only contract of carriage was TWA Airbill No. 15-STL-993916 [Ex. 2]. This contract, by its clear provisions, required TWA to pick up the shipment in St. Louis and deliver it to Calnevar's door at 1732-42 West Washington Boulevard, Los Angeles, California. The Airbill constituted a door-to-door contract of transportation with TWA.

The Appellee has quoted from Section 483 of Title 49. The Appellant submits that Appellee's quotation of Section 483, Title 49, specifically requires the filing of tariffs by air carriers showing to the extent required by the Civil Aeronautics Board the rules and regulations pertaining *to services performed in connection with air transportation*:

> "Sec. 483. Tariffs of air carriers.
>
> "(a) Every air carrier and every foreign air carrier shall file with the Board, * * * tariffs showing all rates, fares, and charges for air transportation between points served by it * * *, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, *and services in connection with* such air transportation."

By this Congressional wording the clear intent is shown that accessorial services were contemplated in conjunction with air transportation. This intent is further demonstrated by the fact that Congress saw fit to amend Section 203(b) of the Interstate Commerce Act by adopting

Section 1107 of the Civil Aeronautics Act of 1938 (49 U. S. C. 677(j)), which Amendment created an exception from the application of the Interstate Commerce Act for "transportation of persons or property by motor vehicle when incidental to transportation by aircraft" (see 49 U. S. C. 303). The purpose of this Amendment was explained by the Civil Aeronautics Board in the case of *Railway Express Agency Grandfather Certificate,* 2 C. A. B. 531, 538, as follows:

> "Moreover, Section 1107(j) amends the motor carrier act to exclude from the regulatory provisions of that act motor vehicle operations which are 'incidental to transportation by aircraft.' It is apparent that it was deemed necessary to avoid conflict of jurisdiction between the Board and the Interstate Commerce Commission."

The fact that motor carrier pick-up and delivery services for air freight is subject to tariff and other requirements of the Civil Aeronautics Act of 1938 has also been fully recognized by the Interstate Commerce Commission.

> *Hazel Kenny Extension-Airfreight,* 61 M. C. C. 588.

2. The Civil Aeronautics Board, Pursuant to the Statutory Authority, Has Specifically Required the Publication of Air Carrier Tariffs in Connection With Services Accessorial to Actual Air Transportation, Including Pick-up and Delivery Services, and TWA Filed Such Required Tariff.

The Civil Aeronautics Board, by its tariff regulations, has recognized and made specific requirements in connection with accessorial services, including pick-up and delivery.

TITLE 14, CIVIL AVIATION, CIVIL AERONAUTICS BOARD, ECONOMIC REGULATIONS, Effective July 1, 1954 (Federal Register of May 29, 1954).

"Section 221.53

"(a) The tariff shall indicate that rates or fares include pick-up, delivery or other services, explicitly defining the services to be furnished and defining the areas or points between which the services will be performed; or

"(b) * * *

"(c) The tariff shall indicate that the rates or fares apply only from airport to airport but that additional services are furnished subject to additional charges, setting forth the carrier's charges for all other services and other provisions applicable thereto, as required by Sec. 221.38, and the tariff shall clearly and explicitly specify the extent to which such services will be furnished and the areas of points within or between which terminal transportation will be provided.

"Sec. 221.38 Rules and regulations—(a) Contents.

"Except as otherwise provided in this part, the rules and regulations of each tariff shall contain: (3) All of the rates or charges for and the provisions governing terminal services *and all other services which the carrier undertakes or holds out to perform on, for, or in connection with air transportation.*" (Emphasis added.)

"Sec. 221.103. Pick-up, delivery and transfer services.

"If the rules containing rates, charges, and other provisions of the air carrier or foreign air carrier applicable to surface transportation, names, pick-up service at points of origin, delivery service at points

of destination, and transfer service at points of interchange, are voluminous, they may be published in a separate governing tariff * * *."

The Court may take judicial notice of Federal Register. 44 U. S. C. A., Sec. 307.

The Circuit Court may take judicial notice of a fact not previously called to the attention of a trial court.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317 U. S. 481;

Brandes v. Mitterling (Ariz.), 196 F. 2d 464.

Congress, by Title 49, Sections 483 and 303, made provisions for and showed its intention that the Civil Aeronautics Board make provisions for the filing of tariffs by an air carrier in connection with accessorial services. The Civil Aeronautics Board performed its required function and adopted regulations in accordance with Congressional directive and intention by Title 14, Civil Aviation (*supra*). Said regulations required a tariff to be filed by the air carrier in connection with accessorial services, including pick-up and delivery services.

TWA, the air carrier involved in this litigation, filed such a tariff and that tariff expressly states that it is governed by the TWA Rules Tariff [Ex. 3].

The contract between Calnevar and TWA for door-to-door shipment was admitted into evidence by stipulation [Tr. p. 41; Ex. 2]. This contract provided

"it is mutually agreed that goods herein described are accepted * * * for transportation as specified herein, *subject to governing classifications and tariffs* * * *. Such classifications and tariffs,

copies of which are available for inspection by parties hereto, are hereby incorporated into and made a part of this contract."

By this contract, Calnevar had constructive notice of all tariffs filed by TWA applicable to the shipment. In the case of *Shortley v. Northwestern Airlines,* 104 Fed. Supp. 152, cited and quoted with approval by the Appellee as a leading case (Appellee's Br. p. 9), the rule was stated as follows:

> "Unquestionably, when a lower rate is charged for the transportation of baggage or property based upon the valuation thereof than would be charged for its transportation if of greater value, appropriate tariff provisions do affect and are *constructive notice to a passenger or shipper."* (Emphasis added.)
>
> *Boston & Main Railroad v. Hooker,* 233 U. S. 97, 58 L. Ed. 868.

In addition to Airfreight Rules Tariff No. 1-A, in evidence, TWA also had on file its tariff entitled "Official Airfreight Pick-up and Delivery Tariff No. 3". This tariff was by its terms incorporated into and made a part of Tariff No. 1-A. By the Airbill contract, in evidence by stipulation, the shipment was subject to both TWA tariffs No. 1-A and 3, and Calnevar had constructive notice of each.

The Court can take judicial notice of the Official Airfreight Pick-up and Delivery Tariff No. 3 filed by TWA.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317 U. S. 481;

Brandes v. Mitterling (Ariz.), 196 P. 2d 464.

The Appellant intends to file, under separate cover, copies of the Federal Register of May 29, 1954, heretofore referred to, and the Official Airfreight Pick-up and Delivery Tariff No. 3 herein referred to, for the convenience of the Court.

Should the Court feel that either of these documents are not properly before the Court, the Appellant would ask opportunity to have these documents incorporated in the record.

3. The Declared Valuation Provisions of TWA Tariffs Do Apply to Appellant, Twentieth Century.

(a) The TWA Tariffs Specifically Provided That the Declared Valuation Provisions Were Applicable to Persons Performing the Accessorial Services for the Air Carrier and That Such Tariff Provisions Were Duly Filed With and Not Rejected by the Civil Aeronautics Board.

The Appellee concedes the validity of declared valuation in principle (Appellee's Br. p. 15).

Had the delivery in this instance been made directly by TWA's employees and trucks, there is no question but what the declared valuation would apply. (*Lichten v. Eastern Airlines,* 189 F. 2d 939, 25 A. L. R. 2d 1337, 1951 U. S. Av. 310.) The contract for carriage was with TWA and called for transportation from St. Louis, Missouri, to 1732-42 West Washington Boulevard, Los Angeles, California. The charges for transportation and delivery were an obligation owed by Calnevar exclusively to TWA [Ex. 2].

The Airfreight Rules Tariff No. 1-A, Rule No. 3.1(a) [Ex. 3] provided as follows:

> "*Each shipment,* irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier's tariffs in effect on the date of acceptance of such shipment by the carrier."

The service contracted for by TWA is a door-to-door service, just as rail express, less than carload rail freight, and motor freight service is a door-to-door service. The *shipment* was governed by the tariffs. The tariff specifically provided that the benefit of the tariffs, including the declared valuation, should inure to anyone performing a ground service that was an obligation of the carrier. As a door-to-door contract of carriage shipment, Twentieth Century was performing a pick-up service for the air carrier, TWA, at the time the damage occurred.

The Rule No. 3.1(b) clearly and unequivocally states that the Airbill and tariffs applicable to the *shipment* shall inure *also* to the benefit of any person performing the pick-up and delivery.

Rule No. 3.1(c) provides that the Airbill and the tariffs applicable to the *shipment* shall apply at all times when the *shipment* is being handled by or *for* the carrier, including the period while the shipment is being handled in pick-up or delivery by any person performing such services for the carrier.

The Airbill, which was a contract of door-to-door shipment, provided for declared valuation [Ex. 2]. There can be no question but that Rule No. 4.3 of the Airfreight Rules Tariff providing for a declared valuation was a part of the TWA tariffs [Ex. 3].

The Appellee concedes that Twentieth Century was "handling the shipment" for TWA when the damage occurred (Appellee's Br. p. 21).

It is difficult for the Appellant to understand how the assertion could be made by the Appellee that the wording of such provisions do not warrant the construction that the benefit of the tariffs inured to Twentieth Century, who was performing a delivery service in the course of door-to-door shipment when the damage occurred.

As heretofore demonstrated, Calnevar had constructive notice of the TWA tariffs.

In any event, the matters involved herein are questions of reasonable necessities of rates and practices and the Appellee cannot collaterally assert the invalidity of tariffs accepted by the Civil Aeronautics Board.

In the case of *Lichten v. Eastern Airlines, Inc.,* 189 F. 2d 939, 25 A. L. R. 2d 1337, at page 1342, the Court states:

> "It is well settled that questions of the reasonableness of rates and practices are to be left to the administrative agency in the first instance and that under this doctrine of 'primary jurisdiction' *the provisions of a tariff properly filed with the Board and within its authority are deemed valid until rejected by it.*" (Emphasis added.)

Boston & Maine Rd. v. Hooker, 233 U. S. 97, 58 L. Ed. 868;

Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553;

Civil Aeronautics Board v. Modern Air Transport, 179 F. 2d 622.

(b) Even Apart From the Tariff Rule, by the Provisions of the Contract Between TWA and Twentieth Century (Through Air Cargo) [Ex. 4] and by Law Twentieth Century Was an Agent and Was Entitled to the Benefit of the Immunities of TWA While Acting Within the Scope of Its Authority.

The Appellee concedes that TWA had delegated to Twentieth Century the duty of handling the coffee machine and that Twentieth Century had custody and control of the machine. The Appellee further concedes that Twentieth Century was *handling the shipment* for TWA when the damage was done (Appellee's Br. p. 21).

Section I of the service contract contains the following definition:

> "The term 'air freight' as used herein means any property (except such as is hereinafter specifically excluded) accepted for or on behalf of an air carrier for transportation *in accordance with and subject to the published tariffs of such air carrier*" [Ex. 4].

These provisions of the contract specifically made the accessorial services performed by Twentieth Century subject to the published tariffs of TWA. A reading of this provision clearly indicates that Twentieth Century was subject to specific instructions of TWA.

Section II of the service contract provides in part as follows:

> "The contractor will pick up, accept, deliver, redeliver, and transfer air freight and issue and/or obtain all necessary shipping documents, receipts, notices, and collect charges in connection therewith in accordance with . . . specific instructions received from the particular air carrier concerned."

By the terms of Section II of the service contract TWA not only retained the right of control, but also provides for specific instructions in connection with pick-up and delivery.

Section 13(c) of the service contract provided as follows:

> "13(c). Contractor and contractor's officers, agents, employees and subcontractors are hereby expressly authorized to act on behalf of and in the name of the air carrier concerned when transacting business, incidental to and in the course of performance of any of the services or duties to be performed by contractor as herein provided, with shippers and consignees of air freight."

These provisions of the contract clearly authorize Twentieth Century to act for and on behalf of TWA in this instance.

By the contract Twentieth Century agreed to perform accessorial services in connection with pick-up and delivery of air freight under the control of the specific instructions of TWA and subject to the express authority given by TWA for Twentieth Century to act for and on behalf of TWA.

The only logical conclusion that can be drawn from the four corners of the service contract is that Twentieth Century was an authorized agent of TWA. The insertion of the bald statement in the contract that Twentieth Century was an independent contractor, evaluated by all of the terms of the contract, can amount to nothing more than an improper legal conclusion of the parties.

Twentieth Century was entitled, as an agent doing an act for TWA, to TWA's immunities. Section 347, Restatement of Agency, provides as follows:

> "An agent who is acting in pursuance of his authority has such immunities of the principal that are not personal to the principal."

In any event, the doctrine of independent contractor, by definition, can have no application to the issues in this case.

The doctrine of independent contractor is a legal concept whereby a principal or employer may insulate himself from liability to certain parties under certain conditions.

> "The doctrine of non-liability for the acts or omissions of an independent contractor or his servant is founded on the principle that one person should not be compelled to answer for the fault or neglect of another over whom he has no control and that the employer has the right to rely upon the presumption that the contractor will discharge his legal duties owing to his employees and third persons."
>
> 57 C. J. S. 355, Sec. 584.

Reduced to its barest fundamentals, the doctrine is invoked when the injured third party attempts to rely on the doctrine of *respondeat superior,* and principal or employer says that in spite of the fact this party was doing an act or service for me, you cannot attach liability to me. The Appellant has searched and has not discovered any cases in which any party other than the employer or a principal was able to assert the doctrine. The Appellee obviously is not in a position of employer or principal as respects the involved transaction. The Appellee is the injured party. Appellee would assert

that because TWA could have asserted, founded or unfounded, a defense of independent contractor for the purposes of immunity to liability, that such circumstance can affect the relationship between the Appellee and the agent Twentieth Century. The Appellant has not been able to find any case of such application of the doctrine. Appellant asserts that the only cases which the Appellant has discovered involved the use by the principal of the doctrine as a shield to liability.

The inapplicability of the doctrine of independent contractor becomes especially apparent in this case where, under the cases previously cited by the Appellant (Appellant's Op. Br., p. 25), TWA would not be able to raise the shield of immunity of independent contractor due to the reason that the doctrine has no applicability between contracting parties. In these circumstances, any discussion of independent contractor to the issues in this case can amount to nothing more than a smoke screen.

The inapplicability of the doctrine of independent contractor to the facts of this case is specifically enunciated in the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.,* 224 F. 2d 181, heretofore cited, page 25, Appellant's Opening Brief.

(c) Even Apart From the Tariff Rule and the Doctrine of Agency, the Provisions of the Original Contract of Carriage for a Through Shipment Extend to All Carriers Participating in the Through Movement.

As heretofore demonstrated, there can be no question but what the contract of carriage in this case was a door-to-door shipment. Without belaboring the authorities heretofore submitted to this Court, the Appellant refers to and asserts that the following cases establish that the

provisions of the original contract of carriage extend to all carriers participating in a through movement.

Texas & Pacific Railway Co. v. Leatherwood (1919), 250 U. S. 478, 63 L. Ed. 1096, 39 S. Ct. 517;

Lyon v. Canadian Pacific Railway Co., 163 N. E. 180, 60 A. L. R. 1247;

Western Transit Co. v. A. C. Leslie & Co., 242 U. S. 448, 61 L. Ed. 423 (Appellant's Op. Br., p. 13);

Georgia, Florida & Alabama Railway Co. v. Blish Milling Co., 231 U. S. 190, 60 L. Ed. 948 (Appellant's Op. Br., p. 14);

A. M. Collins & Co. v. Panama Railway Co., 197 F. 2d 893, 97 L. Ed. 677, 344 U. S. 875, 73 S. Ct. 168 (Appellant's Op. Br., p. 18);

Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co., 224 F. 2d 181 (Appellant's Op. Br., p. 20).

4. **The Appellee's Cases in Support of Its Contention of Invalidity and Ineffectiveness Do Not Support the Appellee's Contention or Apply to Cases Involving the Carriage of Property Such as Was Being Performed by the Defendant Twentieth Century in This Instance.**

The following cases cited by the Appellee represent cases in which the filed tariffs were not effective because they were beyond the scope of the law or regulations.

Shortley v. Northwestern Airlines, 104 Fed. Supp. 152;

Thomas v. American Airlines, Inc., 104 Fed. Supp. 650;

Toman v. Mid-Continental Airlines, Inc., 107 Fed. Supp. 345;

Turoff v. Eastern Airlines, Inc., 129 Fed. Supp. 319;

Bernard v. U. S. Air Coach, 117 Fed. Supp. 134;

Pacific S.S. Co. v. Cackette, 8 F. 2d 259.

The doctrine of the above cases cited by Appellee is not authority in the case at bar in that, as has heretofore been demonstrated, there is statutory and Civil Aeronautics Board authority for the filing of the declared valuation provision of the TWA tariff. Each of the above cited cases submitted by the Appellee involve claim procedure or other matters in connection with personal injury. As respects air tariffs, the Civil Aeronautics Board has acknowledged the rule of the above cases as respects personal injury and prohibits by its regulations any applicable tariffs stating any limitations or conditions in connection with carrier's liability for personal injury or death.

221.38(h) Title 14—Civil Aviation, Civil Aeronautics Board, Economic Regulations, Effective July 1, 1954, Federal Register of May 29, 1954:

> "(h) *Personal liability rules.* No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms."

The leading case (Appellee's Br., p. 9), *Shortley v. Northwestern Airlines,* held that requirements in con-

nection with notice of injury were invalid. The decision further stated as follows:

> "Unquestionably, when a lower rate is charged for the *transportation of baggage* or property based upon the valuation thereof than would be charged for its transportation if of greater value, appropriate tariff provisions do affect the rates and charges and are constructive notice to passenger or shipper." (Appellee's Br., p. 10; Emphasis added.)

This case acknowledges the differential between the rules and regulations applying to personal injury in air transportation and the tariff rules and regulations applying to the carriage of property.

In the case of *Southern Pacific Co. v. United States,* cited by the Appellee, the factual circumstances are such that the attempted filed tariff in connection with government shipment was not authorized as a special classification, and could not under the law and the regulations be said to comply in any way.

In the case of *New York, N. H. & H. R. Co. v. Nothnagle,* cited by the Appellee, the fact is that the court recognized the service of the red cap involved as an air transportation accessorial service.

The Court stated:

> "We have little doubt that the transaction was an incident to an interstate journey within the ambit of the Interstate Commerce Act and neither continuity of interstate movement nor isolated segments of the trip can be decisive. 'The actual facts govern, for this purpose, the destination intended by the passenger when he begins his journey and, known to the carrier, determines the character of commerce.' "

Because of value of the property and other incidents and circumstances the court determined that the limitation did not apply and stated:

> "but the facts here do not bring the case within the statutory conditions."

The Appellant, in its Opening Brief, cited the *Lichten v. Eastern Airlines, Inc.,* case, and under this section the Appellee has attempted to distinguish that case on the basis that the tariffs there involved permitted the passengers to declare a value by paying an additional fare. Appellee asserts that Calnevar was not offered any such election. Rule No. 4.3 of the Air Tariff, Subsection (a) 3, specifically afforded to Calnevar the election concerning which the Appellee complains [Ex. 3].

In the case of *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.,* 224 F. 2d 181, heretofore cited in the Appellant's Opening Brief, the Court stated:

> "In the case at bar all carriers handling the shipment participate in the cost of rendering the service and the revenue in connection therewith. It would be unfair and contrary to public policy enunciated by Congress to permit the plaintiff to recover $10,-444.50 when, by its declaration, a value of $2,000.00, it has enjoyed the benefit of a lower transportation charge credited upon the low declared value."

Calnevar had the same election as to transportation rates and declared valuation with TWA as Lichten had with Eastern Airlines.

B. AIRFREIGHT RULES TARIFF NO. 1-A AND THE TARIFFS OF TWA DO REGULATE AND APPLY TO THE APPELLANT.

As heretofore indicated, the shipment involved was a door-to-door shipment and the terms of Airfreight Rules Tariff No. 1-A clearly apply to the Appellant. The Appellee would argue that because of a possibility that another tariff might apply, the Airfreight Rules Tariff No. 1-A is voided. Even if such an assertion were logical, the fact of the matter is that TWA did have on file its Tariff No. 3 entitled "Official Airfreight Pick-up and Delivery Tariff No. 3," which pick-up and delivery Tariff is governed by Tariff No. 1-A, in evidence [Ex. 3], except as to the specific matters set forth in Tariff No. 3. The provisions in Tariff No. 3 so providing, refer to Tariff No. 1. Tariff No. 1-A, under the caption "Cancellation Notice," supersedes Tariff No. 1 [Ex. 3].

In Airfreight Pickup and Delivery Tariff No. 3 no specific reference is made to declared valuation or the matters set forth in Rule No. 3.1(b) and 3.1(c) of the Airfreight Rules Tariff, the result being that the Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c) and 4.3 govern and require the application of the declared valuation in this instance.

As heretofore demonstrated, Calnevar had constructive notice of TWA Tariffs Nos. 1-A and 3, and, in any event, the Court can take judicial notice of said tariffs.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317 U. S. 481;

Brandes v. Mitterling, 196 P. 2d 464 (Ariz.).

In any event, this is a through shipment in which Calnevar contracted exclusively with TWA and the obligation for the payment of the air transportation, the pick-up and delivery was owed by Calnevar exclusively to TWA.

As heretofore demonstrated, Airfreight Rules Tariff No. 1-A specifically provided that the benefit of the Air-bill and the rules of TWA were to extend to any person performing services for TWA or handling the shipment. As heretofore pointed out, Twentieth Century was performing delivery service for TWA and was so handling the shipment at the time of the damage.

C. THE RATIONALE OF INTERSTATE COMMERCE ACT AND THE UNIFORMITY OF RULES AND REGULATIONS COMPEL THE APPLICATION OF THE DECLARED VALUATION TO THE SHIPMENT, UNAFFECTED BY THE RELATIONSHIP OF THE PARTIES.

The effect of filing schedules of rates with the Interstate Commerce Commission is to make the published rates binding upon the shipper and carrier alike, thus making effectual the purpose of the act to have but one rate open to all alike and from which there can be no departure. The declared valuation filed and posted as a part of the tariff became and was an essential part of the filed rate.

> *Boston & Maine Railroad Co. v. Hooker,* 233 U. S. 97, 58 L. Ed. 868.

The Appellee, in recognizing the general principle of declared valuation (Appellee's Br., p. 16), without authority states that it is unreasonable to have the tariff apply to the shipment and asserts that the only reasonable way to have it apply would be to determine in each instance

the relation of the parties to the specific transaction. Appellant submits that any such rule must in its application defeat the announced purpose of the rate regulations by the Interstate Commerce Commission, namely to have but one rate open to all alike and from which there could be no departure.

D. THE DOCTRINE OF INDEPENDENT CONTRACTOR, BY DEFINITION, CAN HAVE NO APPLICATION TO THE ISSUES IN THIS CASE, AND, IN ANY EVENT, TWENTIETH CENTURY WAS AGENT FOR TWA IN MAKING DELIVERY OF THE INVOLVED PROPERTY.

The Appellant submits by reference Section A3(b) of this Brief in answer to Appellee's contentions under this subsection and in support of the Appellant's principles above stated.

E. THE APPELLEE HAS FAILED TO DISTINGUISH THE APPELLANT'S CITATIONS.

The Appellee would distinguish the *Texas & Pacific Railway Co. et al. v. Leatherwood* case, 250 U. S. 478, on the basis that the case was decided under the Carmack Amendment. In the case of *Kansas City Southern Railway Co. v. Carl,* 227 U. S. 639, 57 L. Ed. 683, the Supreme Court held that any limitation of liability in a contract made by an initial rail carrier of interstate shipment which would be valid on its own behalf would inure to the benefit of any succeeding carrier in the chain of transportation and, reaching this conclusion the Supreme Court of the United States reversed the Supreme Court of Arkansas, which had taken the position that the Carmack Amendment had changed the common law rule in this respect. The Supreme Court held that the

common law rule continued to apply, despite the Carmack Amendment.

In the two following cases antedating the Interstate Commerce Act itself, the Supreme Court upheld limitation of liability in a bill of lading made by an initial carrier and extended the benefit of limitation to all connecting carriers.

Evansville & C. R. Co. v. Andros Coggin Mills, 89 U. S. 594, 22 L. Ed. 724 (1874);

Derring v. Norfolk & W. R. Co., 21 Fed. 25 (1874).

The Appellee would attempt also to distinguish the *Texas* case on the basis that the airport terminal in the air transportation becomes such an incident in the overall shipment, in spite of the fact that the Airbill calls for complete shipment from St. Louis to Washington Boulevard, that the shipment loses all characteristics of interstate commerce and the applicability of the duly enacted Interstate Commerce Act and the regulations of the Civil Aeronautics Board in connection therewith. The Appellant submits that as an incident of door-to-door transportation an airport terminal has no more peculiarities to it than the termination yards of a particular railroad where the goods being transported come to rest and must be thereafter carried by another carrier.

The Appellee would dispose of the *Lyon* and *Georgia, Florida & Alabama R.* cases in like manner as the *Texas* case and the Appellant submits his argument hereto advanced in connection with the *Texas* case.

The cases of *Western Transit Co.* and *Cleveland, Cincinnati, Chicago & St. Louis R. Co.* are admitted by the Appellee to stand for the proposition that the benefit of

declared valuation can extend itself to activities the nature of which is different than that involved in the basic transportation. The Appellant submits that this is the wording and intent of the Interstate Commerce Act and that the applicability of the tariffs is determined solely by whether the goods are in the course of interstate *shipment.*

The Appellee would distinguish the *A. M. Collins* case on the basis (1) that the Carriage of Goods by Sea Act extends and is applicable to activities with the goods until they are discharged from the ship, and (2) that the stevedores involved were engaged by the vessel as an accommodation to the vessel and the charges incurred thereby were absorbed by the vessel.

By the Airbill involved in this transaction, delivery was required to be made on Washington Boulevard in Los Angeles, California. It was not to be expected that an airplane would make the final delivery. The tariffs and the Civil Aeronautics Board Regulations, and the Interstate Commerce Act all contemplated motor vehicle transportation. Like the Carriage of Goods by Sea Act, the Civil Aeronautics Act involved in this situation contemplated a discharge of the goods on Washington Boulevard.

The only charge indicated for the air carriage, pick-up or delivery is incurred and owed to TWA, who holds a similar position to the vessel in the *A. M. Collins* case.

In the case of *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.* the ultimate holding of the court was that a railroad was entitled to the benefits of a railway express declaration of value for the reason that the rate of transportation was based upon a lesser declared value. The court specifically states that the shipment "has enjoyed the benefit of a lower transportation charge credited upon the low declared value."

II.

THE EVIDENCE FAILS TO SUPPORT THE TRIAL COURT'S FINDING OF DAMAGES.

In answer to the Appellee's assertion in connection with damages, the Appellant refers to the arguments set forth in the Appellant's Opening Brief and the Appellant again asserts that the proof of damage in this case is not realistic and is speculative. The Appellant cites the following incompatible contentions in the Appellee's Brief as further examples of the lack of any evidence other than speculative in support of damages.

(1) That the reasonable basis for the calculation of the physical damage to the machine required the application of a two and one-half week repair period in which to complete the machine, which period required the inclusion of overtime payment in the loss calculation.

(2) That the loss of use factor of $1931.25, unsupported by any legal evidence, was justified by the mere fact that Calnevar took three to four months to repair the machine.

Respectfully submitted,

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Attorney for Appellant.